

MOTION FILED
MAR 17 1978

IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-510

UNITED STATES OF AMERICA,
Petitioner,

v.

STATE OF NEW MEXICO,
Respondent.

**MOTION FOR LEAVE TO FILE BRIEF
AS AMICI CURIAE AND
BRIEF AMICUS CURIAE OF
NATIONAL WILDLIFE FEDERATION
AND NEW MEXICO WILDLIFE FEDERATION**

PATRICK A. PARENTEAU
1412 Sixteenth Street, N.W.
Washington, D.C. 20036
Attorney for Amici Curiae.

INDEX

	Page
CITATIONS	iii
MOTION	1
INTEREST OF AMICI	2
INTRODUCTION	1
STATEMENT OF THE CASE	2
ARGUMENT	3
I. FISH AND WILDLIFE ARE KEY RE- SOURCES OF THE NATIONAL FORESTS.....	3
II. IN THE SEMI-ARID SOUTHWEST, WATER IS ESSENTIAL FOR FISH AND WILDLIFE PROPAGATION AND SURVIVAL	7
III. THE PURPOSES FOR WHICH THE NATION- AL FORESTS WERE CREATED INCLUDE THE PROPAGATION OF FISH AND WILD- LIFE AND THE PROTECTION OF THEIR HABITAT	8
A. On Its Face the Organic Act is an Unre- stricted Mandate to Establish and Adminis- ter the National Forests for the Purpose of Improving and Protecting "the Forest," which Includes Both Plants and Animals	8
B. The Legislative History Clearly Shows That Congress Understood the Close Relationship that Exists between the Plants and Animals of the Forest and Provided for the Protection of Both	10

INDEX—Continued

	Page
IV. THERE IS NO MERIT IN THE ASSERTION THAT NATIONAL FOREST "USES" HAVE NOTHING TO DO WITH NATIONAL FOREST "PURPOSES"; THE "PURPOSES" FOR WHICH A NATIONAL FOREST IS CREATED NECESSARILY DICTATE WHAT "USES" CAN BE MADE OF FOREST RESOURCES....	16
CONCLUSION	20
APPENDIX	A-1

CITATIONS

Cases:	Page
<i>Arizona v. California</i> , 373 U.S. 543 (1964)	3, 7
<i>Cappaert v. United States</i> , 426 U.S. 128 (1976)	1
<i>McMichael v. United States</i> , 335 F.2d 283 (9th Cir. 1964)	19
<i>United States v. District Court of Eagle County</i> , 401 U.S. 520 (1971)	12
<i>United States v. Grimaud</i> , 220 U.S. 506 (1911)	19
<i>United States v. Oregon</i> , 366 U.S. 643 (1961)	10
<i>Wilderness Society v. Morton</i> , 479 F.2d 842 (D.C. Cir. 1973), certiorari denied, 411 U.S. 917 (1973)	9
<i>Zuber v. Allen</i> , 396 U.S. 168 (1969)	14
Statutes:	
Appropriation Act of 1899, 30 Stat. 1074	14
Appropriation Act of 1907, 34 Stat. 1256	14
Appropriation Act of 1915, 38 Stat. 1101	14
Bankhead-Jones Farm Tenant Act, 7 U.S.C. 1010	14
Creative Act of 1891, 26 Stat. 1103	11
McSweeney-McNary Act, 16 U.S.C. 581 (d)	14
Multiple Use-Sustained Yield Act, 74 Stat. 215, 16 U.S.C. 528	15
Organic Act of 1897, 16 U.S.C. 473	passim
Organic Act of 1944, 16 U.S.C. 526	15
Sustained Yield Forest Management Act, 16 U.S.C. 583	15
Miscellaneous:	
1 <i>Blackstones Commentaries</i> 289	9
<i>Bouvier's Law Dictionary</i> (1914)	9
Department of Agriculture, "Insect Injuries to Hardwood Forest Trees," <i>U.S.D.A. Yearbook for 1903</i> (1904)	5
Department of Agriculture, <i>Wildlife for Tomorrow</i> , PA-989 (1972)	4

CITATIONS—Continued

	Page
<i>Department of Agriculture, National Plan for American Forestry, S. Doc. No. 12, 73d Cong., 1st Sess. 497 (1933)</i>	4, 6, 16
<i>Department of the Interior Geological Survey, Water Use in the United States (1973)</i>	8
<i>Fish and Game Commission of New York, "The Economic Value of Birds to the State," by Frank M. Chapman, Seventh Annual Report (1903)</i>	6
<i>Forbush, Useful Birds and Their Protection (1907)</i>	5
<i>Frome, Whose Woods These Are: The Story of the National Forests (1962)</i>	17
<i>Gosz, Holmes, Likens and Bormann, "The Flow of Energy in a Forest Ecosystem," Scientific American (March, 1978)</i>	5, A-1
<i>Grinnell, "Spare the Trees," Forest and Stream (April 13, 1882)</i>	7
<i>Hamilton and Cook, "Small Mammals and the Forest," Journal of Forestry (June, 1940)</i>	6
<i>Hearings on H.R. 1823 Before the Forestry Subcommittee of the House Committee on Agriculture, 84th Cong., 1st Sess. 14 (1956) (Statement of Edward C. Crafts)</i>	3
<i>Holdsworth, 1. A History of English Law 94 (1927)</i>	9
<i>Hornaday, Wildlife Conservation in Theory and Practice (1914)</i>	5
<i>H.R. 119, 53d Cong., 1st Sess. (1896)</i>	11
<i>H.R. Rep. No. 1551, 86th Cong., 2d Sess. 7 (1960)</i> ..	15
<i>Les Termes De La Ley (1812)</i>	9
<i>Manwood, Treatise of the Laws of the Forest</i>	9
<i>Mozley & Whiteley's Law Dictionary (9th ed. 1977)</i>	9
<i>Robbins, Our Landed Heritage: The Public Domain 1776-1910 (2d Ed., 1976)</i>	11, 12
<i>Robinson, The Forest Service (1975)</i>	4, 12, 17

CITATIONS—Continued

	Page
<i>Roosevelt, Presidential Proclamations of July 21, 1905, February 6, 1907, June 18, 1908</i>	14
<i>Roosevelt, State of the Union Address, 35 Cong. Rec. 85-6 (December 3, 1901)</i>	13, 19
<i>S. Rep. No. 1407, 86th Cong., 2d Sess. 3 (1960)</i>	16
<i>Spurr, Forest Ecology (1969)</i>	10
<i>U.S. Forest Service, Recreational Uses of the National Forests (1918)</i>	17

IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-510

UNITED STATES OF AMERICA,
v. *Petitioner,*
STATE OF NEW MEXICO,
Respondent.

**MOTION FOR LEAVE TO FILE BRIEF
AS AMICI CURIAE**

Pursuant to Rule 42(3), the National Wildlife Federation, with its principal office at 1412 16th Street, N.W., Washington, D.C., 20036, and the New Mexico Wildlife Federation, with its principal office at 300 Val Verde, S.E., Albuquerque, New Mexico, 87108, move the Court for leave to file the attached brief *amicus curiae* in support of the Petition in the above-captioned case.

Both counsel for the petitioner and counsel for the respondent have consented to the filing of the attached brief. A motion for leave to file is necessary, however, since the petitioner's brief was due on 24 February 1978: the attached brief is thus presented outside of the time allowed under Rule 42(2). A typed copy of the attached brief was delivered to counsel for respondent, via air express, on 14 March 1978.

INTEREST OF THE AMICI

The National Wildlife Federation, a nonprofit membership corporation organized under the laws of the District of Columbia in 1939, is dedicated to the restoration, wise use, and perpetuation of the natural resources of North America, including the public resources of the National Forests. The Federation is the world's largest conservation organization with a combined membership of over two million persons. Members of the Federation regularly use and enjoy the water resources of the National Forests for fishing, hunting, camping, boating, photography, study and other forms of outdoor recreation. As a group these individuals comprise a substantial number of public users of the National Forests.

The National Wildlife Federation has been involved with protection of the water resources of the National Forests on several fronts, including: testimony in support of comprehensive forest management legislation; administrative action limiting timber cutting to protect the Bachman's Warbler, an Endangered Species; publication of numerous articles in *National Wildlife Magazine* and *Conservation News* dealing with National Forest and water issues; submission of recommendations to the President's Water Resource Policy Study regarding use of the federal reserve rights doctrine for minimum stream-flow protection.

The New Mexico Wildlife Federation is a nonprofit organization incorporated under the laws of the State of New Mexico and dedicated to the wise use, preservation, aesthetic appreciation and restoration of wildlife and other natural resources. The New Mexico Wildlife Federation has a membership of approximately 4,840 individuals, many of whom regularly use and enjoy the water resources of the Gila National Forest for fishing, hunting, observation, and other forms of outdoor recreation.

This case presents a general issue of great and continuing concern to the National and New Mexico Wildlife Federations and to other public users of the National Forests: the maintenance of an adequate supply of water of sufficient quality to protect the public's interest in the public forest lands and resources. In the present case the specific question is whether the United States is entitled to reserved water rights in the Gila National Forest to protect instream uses of water, including watershed management, fish and wildlife propagation, recreation, livestock watering, fire protection, endangered species protection, and vegetative growth. The New Mexico Supreme Court denied the United States a priority water right for these uses, holding that the Organic Administration Act of 1897, 16 U.S.C. 475, did not include minimum instream flows or recreational water uses within its express purposes. This holding, based upon a sweeping—and, we submit, erroneous—interpretation of the 1897 Organic Act, extends far beyond the boundaries of the Gila National Forest; it threatens the ability of the Forest Service to manage water supplies in the public interest on approximately 187 million acres of reserved forest lands nationwide.

The National and New Mexico Wildlife Federations submit the attached brief to articulate and defend the substantial public interest affected by this decision.

Respectfully submitted,

PATRICK A. PARENTEAU
1412 Sixteenth Street, N.W.
Washington, D.C. 20036

Attorney for Amici Curiae.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-510

UNITED STATES OF AMERICA,
v. *Petitioner,*
STATE OF NEW MEXICO,
Respondent.

**BRIEF AMICUS CURIAE OF
NATIONAL WILDLIFE FEDERATION
AND NEW MEXICO WILDLIFE FEDERATION**

INTRODUCTION

This Court has long held that “[l]ands in a forest reserve not only are specifically reserved from sale, but . . . are set apart for a public purpose.” *Chicago M. & St. P. Ry. v. United States*, 244 U.S. 351, 356 (1917). This Court has also repeatedly held that a Federal reservation of public land implicitly reserves unappropriated, appurtenant water to accomplish the public purpose of the land reservation. *Cappaert v. United States*, 426 U.S. 128, 138 (1976). The issue here presented is whether Congress intended, by the Organic Act of 1897, 16 U.S.C. 473-482, 511 (hereinafter the Organic Act), to exclude from the public purposes of our National Forests the protection of Forest fish and wildlife resources.

STATEMENT OF THE CASE

The issue here presented was framed by the findings and conclusions of the Special Master who heard the case below, by the trial court's modifications of those findings and conclusions, and by the New Mexico Supreme Court's decision affirming the trial court's decision.

Amicii concur in the Statement presented on page 2 of the Brief of the United States, but would emphasize the following facts:

1.) The Special Master found that as of December 27, 1972, thirty-seven separate water uses had been made by the Gila National Forest, including the following (App. 192-93):

U.S. #	Quantity	Purpose	Appropriation Date
024	2 CFS	Fish	3-2-1899
511	2 CFS	Fish	3-2-1899
786	2 CFS	Fish	3-2-1899
904	0.10 acre ft. per annum	Wildlife	6-18-1908

2.) The Master also found "[t]hat said instream uses numbered 024, 511 and 786 can be made without interfering with the express purpose of the Gila National Forest of managing the watershed in such a way as to maximize the water yield to downstream appropriators" (#5, App. 194)¹ and, "[t]hat the United States reserved waters of the Mimbres River Stream System, from its then unappropriated waters, for uses necessary for the requirements and purposes of its reserved lands specified above, with priority dates of the various withdrawals from the public domain" (#4, App. 197).

¹ The purpose of the instream flow was uncontested below and included preservation of fish (including the endangered Gila Trout (*Salmo gilae*)), erosion control, fire protection, watershed protection, wildlife habitat, maintenance of downstream flows and aesthetics.

3.) The Master also expressly found that the purposes of the Forest included recreational uses such as "hiking, fishing, camping and hunting" (#11, App. 198), and fish and wildlife protection (App. 192-93; and #10, App. 198).²

4.) Without taking additional evidence, the trial court deleted from the list of Forest water uses the four fish and wildlife uses noted above (App. 226-27) and overruled the Master's conclusion that fish and wildlife protection was one of the purposes for which National Forests were created.³ The New Mexico Supreme Court affirmed the trial court's holding (App. 241).

ARGUMENT

I. FISH AND WILDLIFE ARE KEY RESOURCES OF THE NATIONAL FORESTS.

The National Forests offer a suitable environment for nearly all forms of fish, game and nongame animals found in the United States. National Forest lands encompass 81,000 miles of streams and 2¼ million acres of lakes and impoundments.⁴ A substantial portion of the country's most productive trout waters are within, or flow from, National Forest areas. These areas are home to

² This independent finding by Special Master Moise corroborates an earlier finding to the same effect by Special Master Rifkind in *Arizona v. California*, 373 U.S. 543 (1964). See, Brief of the United States, at pp. 18-20. These findings by the principal fact finders ought to be accorded great weight.

³ The trial court also specifically concluded that recreational uses—such as hiking, camping, fishing and hunting—were not among the purposes for which the Forest was, or could have been, created (App. 230-31).

⁴ *Hearings on H.R. 1823 Before the Forestry Subcommittee of the House Committee on Agriculture*, 84th Cong., 1st Sess. 14 (1956) (statement of Edward C. Crafts, Assistant Chief, Forest Service).

some 3.3 million big game animals, including more than four-fifths of the country's grizzly bear, moose, and mountain goats; two-thirds of the country's mule deer, black-tail deer and elk populations, and over half of the black bear and bighorn sheep populations.⁵

More than half of the fish and wildlife species currently designated as "endangered" or "threatened" can be found in, or in close proximity to, our National Forests.⁶ In the instant case, the endangered Gila Trout, an inhabitant of the Rio Mimbres River, would be a principal beneficiary of the instream flow requested by the Forest Service (App. 89).

The fish and wildlife resources of the National Forests are vitally important to the commercial and economic well-being of the United States. More than 40 per cent of the salmon taken in the Pacific Coast commercial and sport fisheries are spawned in National Forest waters.⁷ Fishing and hunting activities in the National Forests generate substantial revenues which can be used to offset forest management and maintenance expenses, and the expenditures of hunters, fishers and other recreational users of the Forests contribute significantly to local economies. In the first systematic, interdisciplinary evaluation of our National Forest program, it was determined that the wildlife resources of the Forests had a national value of over \$1 billion.⁸

⁵ *Id.* at 15.

⁶ Robinson, *The Forest Service* (1975), p. 239, note 1 (hereinafter Robinson).

⁷ Department of Agriculture, *Wildlife for Tomorrow*, PA-989 (1972).

⁸ Department of Agriculture, *National Plan for American Forestry*, S. Doc. No. 12, 73d Cong., 1st Sess. 497 (1933) (hereinafter the *Copeland Report*).

More importantly, in the context of this case, wildlife plays an essential role in maintaining the overall health and balance of the forest and in contributing to the production of valuable forest products such as timber. The producing and consuming organisms (i.e., plants and animals) of the forest community interact in a self-regulating manner which perpetuates forest productivity. For example, a plant species may serve as food for a species of insect, which in turn serves as food for a species of bird. It is through a myriad of such relationships that the primary vegetative productivity of the forest is maintained.⁹ The diagram contained in the Appendix illustrates how these relationships contribute to the functioning of the forest.

By 1900 it had become an accepted ecological fact that wildlife is essential to a healthy forest and to sound forest management. It had been shown that certain bird species were of primary importance to efficient and profitable timber production since birds were the only effective means by which insect pests could be controlled.¹⁰ As one noted early twentieth century ornithologist declared, "[w]ere the natural enemies of forest insects [birds] annihilated, every tree in our woods would be threatened with destruction, and man would be powerless to prevent the calamity" (emphasis added).¹¹

This intense interdependence between forest trees and birds was documented in 1903 by Frank M. Chapman:

⁹ Gosz, Holmes, Likens and Bormann, "The Flow of Energy in a Forest Ecosystem," *Scientific American* (March, 1978), p. 102.

¹⁰ W. Hornaday, *Wildlife Conservation in Theory and Practice* (1914), p. 45. See also, Department of Agriculture, "Insect Injuries to Hardwood Forest Trees," *U.S.D.A. Yearbook for 1903* (1904), pp. 313-328.

¹¹ E. H. Forbush, *Useful Birds and Their Protection* (1907), p. 90. As this book notes, birds are not only important sources of insect control but also for seed distribution and tree-pruning. Squirrels are also important in this respect. *Id.* at 99, 100.

Between birds and forests there exist what may be termed primeval, economic relations. Certain forest trees have their *natural* insect foes, to which they furnish food and shelter, and these insects, in turn, have their *natural* enemies among the birds, to which the trees also give a home Hence it follows that the existence of each one of these forms of life is dependent upon the existence of the other. Birds are not only essential to the welfare of the tree, but the tree is necessary to the life of the bird. Consequently there has been established what is termed "a balance of life," wherein there is the most delicate adjustment between the tree, the insect, the bird, and the sum total of the conditions which go to make up their environment (emphasis added).¹²

The principle that sound forest and timber management practices require considerable emphasis on wildlife protection was explicitly recognized in the *Copeland Report*:

All of the relationships existing between game and other of the various products, uses and services inherent in forest lands emphasize the extremely fundamental character of the problems confronted in obtaining satisfactory control and balance of the intricate and interrelated natural factors, and in the application of sound plans involving not only game but timber and all other products and uses of forest land.¹³

As the above writings demonstrate, "improv[ing] and protect[ing] the forest" and "securing favorable conditions of water flows, and furnish[ing] a continuous sup-

¹² Fish and Game Commission of New York State, "The Economic Value of Birds to the State," *Seventh Annual Report* (1903), p. 6.

¹³ *Copeland Report*, *supra* n. 8, at 501. See also, W. T. Hamilton and D. B. Cook, "Small Mammals and the Forest," *Journal of Forestry*, (June, 1940), pp. 468-473. This article describes the important role insectivorous mammals play in insect control and soil conditioning.

ply of timber," Organic Act, 16 U.S.C. 475, means protecting the *wildlife resources* of our National Forests.

II. IN THE SEMI-ARID SOUTHWEST, WATER IS ESSENTIAL FOR FISH AND WILDLIFE PROPAGATION AND SURVIVAL.

The crucial importance of water in the semi-arid regions of our country has long been recognized. As President Roosevelt said in his first State of the Union Address: "In the arid region it is water, not land, which measures production." 35 Cong. Reg. 85 (December 3, 1901). See also, *Arizona v. California*, *supra* note 2, at 598 (in the arid West, water is "necessary to sustain life"). The undisputed record in this case demonstrates that these general principles are especially applicable to the Gila National Forest. The requested minimum instream flow use, although non-consumptive, is essential to the protection of the Forest's resources. As Forester Ritchey, the agent in charge of soil and watershed management for the Gila National Forest, testified: "[I]f the [minimum instream flow] water is taken away, we have a tragedy, no fish, no trees, nothing" (App. 109).¹⁴

In spite of the well-established importance of water in arid regions such as the Gila National Forest, the New Mexico Supreme Court disallowed the use of the sole wildlife watering station in the Forest. The trial court's holding on this question was affirmed even though watering station use accounted for an insignificant consumption of water (30,000 gallons per year) and was extremely

¹⁴ Ritchey's testimony recalls the words of one of the Nation's earliest conservationists, George Bird Grinnell, who, in an 1882 essay entitled "Spare the Trees," wrote regarding the consequences of failing to maintain a balanced forest domain: "No woods, no game; no woods, no water; and no water, no fish." *Forest and Stream* (April 13, 1882).

important to Forest wildlife.¹⁵ As Forester Ritchey explained, the high elevation arid regions of the Forest "literally [provide] the last refuge for our deer and elk and smaller game" (App. 88-89). Since no "stock" watering holes useable by wildlife are found at these altitudes, the Gila's single wildlife watering station was placed "up in the high rocky country" (App. 88). By disallowing this small consumptive use, the New Mexico Supreme Court's decision threatens this "last refuge" and the wildlife it supports with extinction.

III. THE PURPOSES FOR WHICH THE NATIONAL FORESTS WERE CREATED INCLUDE THE PROPAGATION OF FISH AND WILDLIFE AND THE PROTECTION OF THEIR HABITAT.

A. On Its Face the Organic Act is an Unrestricted Mandate to Establish and Administer the National Forests for the Purpose of Improving and Protecting "the Forest," Which Includes Both Plants and Animals.

The Supreme Court of New Mexico (App. 241) and the State of New Mexico (App. 158-59) are obviously in error in asserting that the 1897 Organic Act allowed National Forests to be established only for the purposes of watershed protection and timber production. The very language used by Congress—which the State has characterized as "unambiguous" (App. 158)—clearly states that Forests may be created "to improve and protect the forest within the boundaries, or for the purposes of securing favorable conditions of water flows." 16 U.S.C. 475 (emphasis added). Since the "improve-or-protect-the-forest" clause was listed separately, first in sequence, and

¹⁵ This is approximately the same consumptive use required for a single American home over the course of a year. Department of the Interior Geological Survey, *Water Use in the United States* (1973), p. 5.

set forth disjunctively from the remaining purposes enumerated in the Act, Congress obviously intended it to have meaning beyond the specified watershed and timber purposes.¹⁶

Moreover, the term "forest" as used in this clause, has an accepted common law meaning which includes flora and fauna. The classic definition of "forest" was given in 1615 by John Manwood in his *Treatise of The Laws of The Forest* (pp. 18-19):

A forest is a certaine Territorie of woody grounds and fruitful pastures, privileged for wild beasts and foules of Forest, Chase and Warren, to rest and abide in, in the safe protection of the King

The 1812 edition of *Les Termes De La Ley* defined the prevailing common law meaning of "forest" in similar terms:

Forest is a place privileged by royal authority, or by prescription, for the peaceable abiding and nourishment of the beasts or birds of the forest

This common law definition was carried forward in the 1884 American edition of *Blackstones Commentaries*:

Forests are waste grounds belonging to the King, replenished with all manner of beasts of chase and venery which are under the King's protection"
1 Bl. Comm. 289.

This established meaning of "forest" has been followed in later works. See, *Bouvier's Law Dictionary* 1278 (1914); 1 W.S. Holdsworth, *A History of English Law* 94-95 (1927); *Mozley & Whiteley's Law Dictionary* 141 (9th ed. 1977).

¹⁶ It is a well-known maxim of statutory construction that all words and provisions of statutes are intended to have meaning and are to be given effect. *Wilderness Society v. Morton*, 479 F.2d 842, 856 (D.C. Cir. 1973), *cert. denied*, 411 U.S. 917 (1973).

The common law meaning of "forest" is fully consistent with the accepted scientific definition of the term:

The forest may be considered as an assemblage of plants and animals living in a biotic association, or biocenosis. The forest association, then, is an assemblage of plants and animals living together in a common environment.

* * *

The forest community and its habitat together comprise an ecological system, or ecosystem, in which the constituent organisms and their environments interact in a vast and complex energy cycle.¹⁷

Since the statute unambiguously authorizes the reservation of National Forests "to improve and protect the forest" as distinct from protecting watershed and timber resources, and since the accepted common law and scientific meanings of "forest" include the flora and fauna of the forest, there can be no doubt that the Organic Act authorized the creation of National Forests to improve and protect the flora and fauna of the Forest. Under the circumstances of such an unambiguous statute, there is "no need to resort to the legislative history of the Act." *United States v. Oregon*, 366 U.S. 643, 648 (1961).

B. The Legislative History Clearly Shows that Congress Understood the Close Relationship that Exists Between the Plants and Animals of the Forest and Provided for the Protection of Both.

The first Congressional action establishing a forest reserve occurred in 1890 when Congress "set apart as reserved forest lands" several tracts in California. This 1890 Act included among its purposes "the preservation from injury of all timber, mineral deposits, natural curiosities, or wonders within said reservation, and their retention in their natural condition." 26 Stat. 650, 651.

¹⁷ S. Spurr, *Forest Ecology* (1969), pp. 2-3.

It was the Congressional intent that among the "natural curiosities, or wonders" to be preserved were the Reserve's indigenous fish and wildlife. Consequently, the "wanton destruction of fish, and game" was prohibited. *Id.*

The following year Congress authorized the President to set apart "public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations." 26 Stat. 1103 (1891), *as amended*, 16 U.S.C. 471. The Conference Committee added this provision to a more general public land law revision bill without comment.¹⁸ The obvious objective of the 1891 enactment was to continue to create more "forest reserves," similar to the one which had been created by Congress the year before.

The principal shortcoming of the 1891 statute was its failure to provide for the administration of the forest reserves. Further congressional action to remedy this situation resulted in the passage of the Organic Act of 1897, *supra*. Several earlier versions of the Organic Act, most notably a bill introduced by Representative McRae of Arkansas, H.R. 119, 53d Cong., 1st Sess. (1896), would have limited the purposes of forest reserves to water supply and timber production.¹⁹ In fact, an amendment to the McRae bill, introduced in the Senate by Henry Teller of Colorado, would have made timber production the sole purpose of forests.²⁰ These approaches were ultimately rejected by the 55th Congress in favor of the broader "improve and protect" language which is now contained in § 475.²¹

¹⁸ R. M. Robbins, *Our Landed Heritage: The Public Domain 1776-1910* (2d Ed., 1976), pp. 301-24 (hereinafter Robbins).

¹⁹ *Id.* at 308.

²⁰ *Id.* at 310.

²¹ *Id.* at 323-24.

In passing the 1897 Act, Congress was well aware of the manifold purposes of forests (the first multi-purpose forest had been created only a few years earlier) and it specifically rejected attempts to narrow those purposes. Moreover, there is nothing in the statute or the legislative history—most of which has been thoroughly explored in the arguments of the United States and the State of New Mexico—to suggest that Congress meant to eliminate fish and wildlife protection as one of the traditional objectives of forest preservation.²²

Further support for the conclusion that the 1897 Act has never been interpreted to exclude fish and wildlife protection can be found in the contemporaneous statements of President Theodore Roosevelt. President Roosevelt's understanding of the purposes of the Forest is critical for several reasons: (1) he was the first President to interpret the authority of the Organic Act; (2) he exercised that authority to the extent of creating 148 million acres of forest reserves—more than three times as many acres as the total set aside in ten years by the three preceding Presidents (Harrison, Cleveland, McKinley) and an amount equal to more than 96 per cent of the total National Forest System today (approximately 154 million acres), and (3) he created the major portion of the Gila National Forest at issue in this case.²³

²² Nor is there any merit to the argument that fish and wildlife protection constitutes a "secondary purpose" of forest preservation. First, the available evidence strongly suggests that fish and wildlife were *included* within the Organic Act's primary purpose, i.e. to "improve and protect the forest." And second, even if fish and wildlife protection be considered a secondary objective, it is nonetheless a *purpose* of the Forests and, as such, is one of the purposes for which water may be impliedly reserved under the reserved rights doctrine. *United States v. District Court of Eagle County*, 401 U.S. 520, 523 (1971) (The reservation of waters may be only implied and the amount will reflect the nature of the federal enclave).

²³ See generally, Robbins, *supra* note 17, at 337-42; and Robinson, *supra* note 6, at 9.

In his 1901 State of the Union Address, President Roosevelt made it clear that among the most important purposes of the forest reserves was the protection of the timber, water and wildlife resources of the Nation's woodlands.

Certain of the forest reserves should also be made preserves for the wild forest creatures. All of the reserves should be better protected from fires. Many of them need special protection because of the great injury done by live stock, above all by sheep. The increase in deer, elk, and other animals in the Yellowstone Park shows what may be expected when other mountain forests are properly protected by law and properly guarded. Some of these areas have been so denuded of surface vegetation by overgrazing that the ground breeding birds, including grouse and quail, and many mammals, including deer, have been exterminated or driven away. At the same time the water-storing capacity of the surface has been decreased or destroyed, thus promoting floods in times of rain and diminishing the flow of streams between rains.

In cases where natural conditions have been restored for a few years, vegetation has again carpeted the ground, birds and deer are coming back, and hundreds of persons, especially from the immediate neighborhood, come each summer to enjoy the privilege of camping. Some at least of the forest reserves should afford perpetual protection to the native fauna and flora, safe havens of refuge to our rapidly diminishing wild animals of the larger kinds, and free camping grounds for the ever-increasing numbers of men and women who have learned to find rest, health, and recreation in the splendid forests and flower-clad meadows of our mountains. The forest reserves should be set apart forever for the use and benefit of our people as a whole and not sacrificed to the short-sighted greed of a few. 35 Cong. Rec. 81, 85-86 (December 3, 1901).

Under accepted principles of statutory interpretation, the contemporaneous interpretations by the agency charged with the administration of a statute are entitled to great weight. *Zuber v. Allen*, 396 U.S. 168, 192 (1969). Here, of course, the contemporaneous interpretation is that of the President of the United States who, in exercising the authority vested in him by the Act of 1891, set aside the majority of the land which comprises the Gila National Forest by proclamations on July 21, 1905, February 6, 1907 and June 18, 1908 (App. 225).

Subsequent Congressional actions confirm that the Organic Act was not intended to exclude fish and wildlife protection or recreation from the purposes of National Forests:

- * The 1899 Appropriation Act required "forest agents" to assist in law enforcement "in relation to the protection of fish and game." 30 Stat. 1074, 1095.

- * The 1907 Appropriation Act stated that one function of the Forest Service was to "care for fish and game supplied to stock the national forests or the waters therein." 34 Stat. 1256.

- * The 1915 Appropriation Act authorized hotels and resorts in National Forests. 38 Stat. 1101.

- * The 1928 McSweeney-McNary Act authorized annual appropriations for investigations to determine "the life histories and habits of forest animals, birds, and wildlife", and to develop "the best and most effective methods for their management and control." 16 U.S.C. 581(d).

- * The 1937 Bankhead-Jones Farm Tenant Act authorized the Secretary of Agriculture to develop a program of land conservation on the public lands to assist in "protecting fish and wildlife . . . and conserving surface and subsurface moisture." 7 U.S.C. 1010.

- * The 1944 Sustained Yield Forest Management Act stated that the purposes of National Forests are intended "to secure the benefits of forests in maintenance of water supply, regulation of streamflow, prevention of soil erosion, and *preservation of wildlife*. 16 U.S.C. 583 (emphasis added).

- * The Organic Act of 1944 contained a provision authorizing expenditures by the Forest Service "necessary for the investigation and establishment of water rights, necessary or beneficial in connection with the administration and *public use* of the national forests." 16 U.S.C. 526 (emphasis added).

In 1960 Congress enacted the Multiple Use-Sustained Yield Act which provided that:

[I]t is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of this Act are declared to be *supplemental to*, and not in derogation of, the purposes for which the national forests were established as set forth in the Act of June 4, 1897 (16 U.S.C. 475). . . . 74 Stat. 215, 16 U.S.C. § 528 (emphasis added).

The meaning of the term "supplemental to" was further clarified in both the House and Senate Reports which stated that:

"The authority to administer recreation and wildlife habitat resources of the national forests has been recognized in numerous appropriation acts and *comes from the authority contained in the act of June 4, 1897, to regulate the 'occupancy and use' of the national forests.*" S. Rep. No. 1407, 86th Cong., 2d Sess. 7 (1960); H.R. Rep. No. 1551, 86th Cong., 2d Sess. 7 (1960) (emphasis added).

Moreover, both Reports pointed out that multiple use management, which includes fish and wildlife preserva-

tion as well as recreation, has long been recognized by the Forest Service and by Congress as an appropriate use of the National Forests:

Through the years, by a number of congressional enactments, including appropriations for carrying out specific activities and functions, through court decisions, and through policy directives and statements, the management of the national forests under the principle of multiple use has been thoroughly recognized and accepted. . . . S. Rep. No. 1407, 86th Cong., 2d Sess. 3 (1960).

The concept of multiple-use management on the National Forests was actually recognized years earlier by Congress. The 1933 *Copeland Report* contains the following statement:

[M]ulti-purpose management for the production, conservation and utilization of timber, forage, water, wildlife and recreational values was *first developed* and is now found generally on the national forests. *Copeland Report*, *supra* note 8, at 89.

The obvious conclusion to be drawn from this compilation of legislative enactments is that Congress was not only well aware of the fish and wildlife purposes of the National Forests, but that it also actively fostered and promoted those purposes through appropriations.

IV. THERE IS NO MERIT IN THE ASSERTION THAT NATIONAL FOREST "USES" HAVE NOTHING TO DO WITH NATIONAL FOREST "PURPOSES"; THE "PURPOSES" FOR WHICH A NATIONAL FOREST IS CREATED NECESSARILY DICTATE WHAT "USES" CAN BE MADE OF FOREST RESOURCES.

New Mexico opposes any consideration of Forest "uses" in determining Forest "purposes." In an attempt to support this position, the State has conjured an imperfect distinction between "use" and "purpose" and has argued

that Forest "uses" have nothing to do with Forest "purposes." (See New Mexico Opposition, at 12).

This argument is mere linguistic sleight of hand. In the first place, there is no disputing the fact that the National Forests have always been used for fish and wildlife purposes and for recreation. Even before the creation of the Forests, these vast public lands were widely used as fishing and hunting areas. These uses have continued to this day.

From the beginning, it was recognized that the national forests were used for recreation such as hunting and fishing, although these activities were not cited in the 1897 act. Robinson, *supra* note 6, at 120, citing M. Frome, *Whose Woods These Are: The Story of the National Forests* (1962), p. 330.

In 1918, the United States Forest Service published a book entitled *Recreational Uses of The National Forests*. In this book it was pointed out that:

Long before the National Forests were established men went hunting in the woods and fishing in the streams. Camping and picnicking in the wilds had an ancient priority over the administration of those same areas by the Federal Government for the production of timber and the conservation of water. *These conditions were not changed by the assignment of the lands to the care of the National Forest Service, except that such recreation uses were multiplied and intensified.*

It is of course inevitable that the Forests should be so used. Outdoor recreation is a necessity of civilized life, and as civilization becomes more intensive the demand grows keener. The vast extent of our present National Forests, their enticing wildness, and the notable beauty of the native landscape lure men and women thither by hundreds of thousands. F. A. Waugh, *Recreational Uses on The National Forests* (1918), p. 3 (emphasis added).

This publication goes on to describe the Forest Service role in the conservation of fish and wildlife on National Forest lands:

Game Preservation. Hunting and fishing are perhaps the sports most typically associated with the Forests. In the great public forests of the Old World the rearing of game for food is often practiced on a large scale. *The propriety of using our National Forests to multiply game for sport, for food, or for its own sake seems obvious.* To these problems the Forest Service has already given considerable study. Specialists from the United States Biological Survey have also assisted materially in this field.

Forest officers everywhere cooperate with other Federal officials and with State and local authorities in stocking streams with trout or lakes with other fish and in their protection under State game laws. Indeed it is almost the rule that the local forest rangers shall be also State game wardens and shall assist everywhere in the enforcement of game laws. *Id.* at 10 (emphasis added).

The book also notes that the roots of our National Forest policy are in European forestry, where wildlife preservation and recreational uses have always been among the paramount purposes of government forests. *Id.* at 4. The author concludes that recreation (hunting, fishing and hiking) "*is inherent in the character of the Forests and must be recognized as a permanent and universal factor in Forest administration.*" *Id.* at 27 (emphasis added). In addition, the Forest Service publication makes the following statements:

Historically it appears that National Forests were first created for purposes of recreation, and that this use is traditionally universal.

* * *

Actually it appears that the National Forests of the United States have always been extensively used

for recreation and that these uses are rapidly increasing.

* * *

The principal forms of recreation now in vogue are hunting, fishing, hiking, packing, camping, automobiling, and picnicking.

* * *

Game preservation has already been recognized as a legitimate and worth-while feature of Forest administration. *Id.* at 36.

* * *

On the basis of this evidence, it is clear that from the beginning it has been recognized that "the forest reserves should be set apart forever for the use and benefit of our people as a whole and not sacrificed to the shortsighted greed of the few." President Theodore Roosevelt's State of The Union Address, *supra*, at 86. The Forests were never intended to serve as sterile monuments; from the creation of the first forest reserve by Congress in 1890 and consistently thereafter they have been intended for the principal purpose of "wise use." It is utterly preposterous to suggest that Forest uses are irrelevant to an evaluation of Forest purposes.²⁴

²⁴ The cases cited in support of the use/purpose dichotomy by the State of New Mexico (New Mexico Opposition, at 13), i.e., *United States v. Grimaud*, 220 U.S. 506 (1911), and *McMichael v. United States*, 335 F.2d 283 (9th Cir. 1964), are inapposite. In both cases the Courts expressly found that the 1897 Organic Act gave the Forest Service the authority to regulate the uses involved (i.e., grazing and off-road vehicle use, respectively) in the face of challenges to that authority based upon the argument that such uses were not within the purposes set forth in § 475 of the Act.

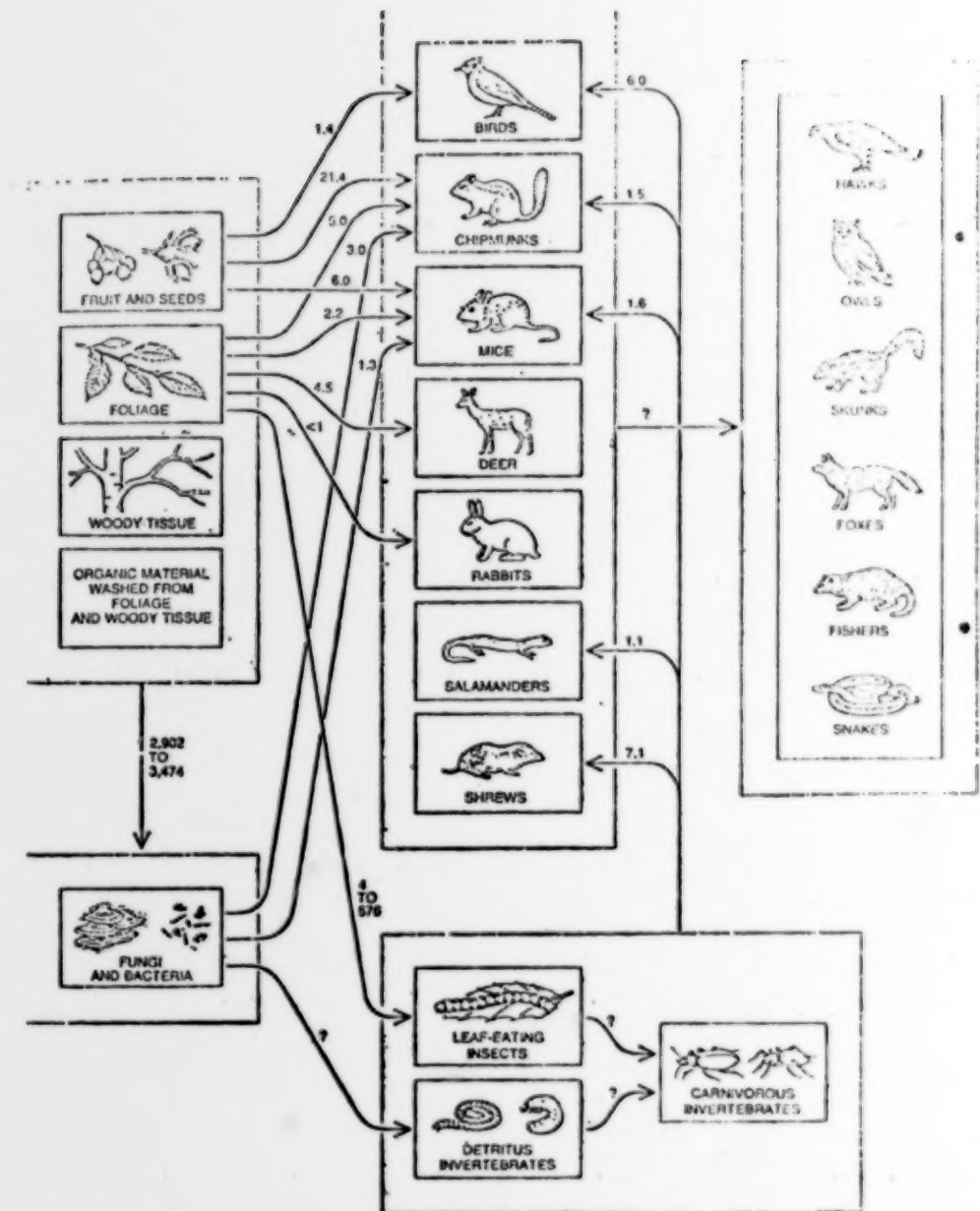
Respectfully submitted,

PATRICK A. PARENTEAU
Attorney for Amicus

Date: March 17, 1978

The contributions to this brief of Donald Baur, second year law student at the University of Pennsylvania School of Law, are gratefully acknowledged.

A-1
APPENDIX



FOOD WEBS of consumers in the Hubbard Brook ecosystem are diagrammed, together with the consumption rate of organisms in each population. All numerical values are in units of kilocalories per square meter per year. The consumption of leaf tissue by herbivorous insects varies greatly from year to year and may have widespread effects on the utilization of energy by other consumers. In most years a large amount of organic material falls to the forest floor and enters

the detritus food web, where it is utilized by fungi, bacteria and certain invertebrates. These organisms serve as food for carnivorous invertebrates, salamanders, snakes and some animals primarily associated with the grazing food web. Birds participate in the grazing food web by eating berries and caterpillars, but they also are able to tap the large detritus energy pool characteristic of northern hardwood-southern coniferous forests by feeding on insects whose larvae feed on detritus.

SOURCE: 238 Scientific American 99 (March, 1978).